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Supreme Court, U.S.
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No. 00-1514

In the

Supreme Court of the United States

Lance Raygor and James Goodchild,

Petitioners,

v.

Regents of the University of Minnesota,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR PETITIONERS

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81 pp

QUESTION PRESENTED

Is the tolling provision of 28 U.S.C. § 1367(d), insofar as it applies to a state defendant, unconstitutional?

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OPINIONS BELOW

The January 4, 2001 opinion of the Minnesota Supreme Court is reported at 620 N.W. 2d 680 (Minn. 2001) and is set out at pp. A1-A15 of the Petition Appendix. The January 11, 2000 opinion of the Minnesota Court of Appeals is reported at 604 N.W. 2d 121 (Minn. Ct. App. 2000) and is set out at pp. A16-A26 of the Petition Appendix. The June 29, 1999 decision of the Hennepin County District Court, which is unreported, is set out at pp. B1-B13 of the Appendix to this brief. The related July 11, 1997 order of the United States District Court for the District of Minnesota, which is not reported, is set out at p. A39 of the Petition Appendix.

JURISDICTION

The Minnesota Supreme Court decision was filed on January 4, 2001. The petition for writ of certiorari was filed on March 30, 2001. This Court granted certiorari on June 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1367 of 28 U.S.C. provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

* * *

(3) the district court has dismissed all claims over which it has original jurisdiction.

* * *

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Section 363.14(1) of the Minnesota Statutes provides in pertinent part that "a person may bring a civil action . . . within 45 days after receipt of notice that the commissioner has dismissed a charge."

STATEMENT OF THE CASE

This is an action involving age discrimination against two employees of the University of Minnesota. The complaint alleged that in December 1994, University officials attempted to compel petitioners, then both fifty-two, to accept early retirement because of their age. When petitioners refused to retire, according to the complaint, they were subjected to a variety of discriminatory actions both because of their age and in retaliation for that refusal. That discrimination included reclassifying their positions in a manner that reduced their annual salaries by approximately $15,000. No employees under the age of 40 were mistreated in the same manner.

Petitioners filed with the EEOC a charge alleging discrimination in violation of the Age Discrimination in Employment Act. Under a worksharing agreement, the EEOC then cross-filed the charge with the Minnesota Department of Human Rights, because the facts alleged also constituted a violation of the Minnesota Human Rights Act ("MHRA"). On June 6, 1996, the EEOC issued a right to sue letter, advising petitioners that they could file an action under the ADEA within 90 days. On July 17, 1996, the Minnesota Department of Human Rights also issued a right-to-sue letter, and advised petitioners that they could file an action under the MHRA within 45 days. (Pet. App. A18).

On August 30, 1996, petitioners commenced actions against the University in federal district court.[1] The complaints alleged both a federal cause of action under the ADEA[2] and a state cause of action under the MHRA. Respondent's answers, filed in September 1996, set out eight affirmative defenses, one of which was that the complaint "is barred in whole or in part by Defendant's Eleventh Amendment immunity." (Answer, p. 2 ¶ 11). The University, however, did not at that point ask the district court to dismiss any portion of the complaints on that basis; instead, it initially proceeded to litigate the cases on the merits. The parties agreed on, and the district court ordered, a scheduling plan under which all discovery was to be completed by May 30, 1997, and dispositive motions were to be filed by July 15, 1997. The University took and responded to discovery[3], and engaged in mediation.

On April 7, 1997, a district judge in an unrelated case in the District of Minnesota issued a decision holding that the ADEA, insofar as it authorized an action in federal court

[1] Initially Raygor and Goodchild filed separate but essentially identical federal complaints. Their cases were eventually consolidated.

[2] At the time the complaint was filed, none of the appellate decisions that led to the decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 71-72 (2000) had yet been decided.

[3] Respondents served 22 interrogatories seeking, among other things, detailed information about Petitioners' contentions, evidence, damages, prior psychological history and therapy, medical providers, employment histories, witnesses, experts, and documents. Respondents also made 21 document requests seeking income tax returns, resumes, medical records, employment records, and personal notes and journals. Finally, respondents requested any statements as defined in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

against a nonconsenting state, was unconstitutional[4]. *Humenansky v. Board of Regents of the Univ. of Minnesota*, 958 F. Supp. 439 (D.Minn. 1997). That decision presaged this Court's later decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). On May 14, 1997, counsel for the University and the two plaintiffs in the instant case filed a stipulation advising the court that the defendant "intends to bring a motion to dismiss the above-captioned actions pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Eleventh Amendment to the United States Constitution bars Plaintiffs' ADEA claims." (Stipulation and Order Concerning Scheduling, p. 2). The stipulation made no mention of petitioners' state law claims under the MHRA. The stipulation included several proposed scheduling changes, including a requirement that the motion be filed prior to July 1, 1997.

The University served its motion to dismiss and supporting memorandum of law on June 3, 1997.[5] In addition to attacking the constitutionality of the ADEA, the defendant's memorandum of law also objected that petitioners' state law claims under the MHRA were barred by the Eleventh Amendment. (Memorandum of Law in Support of Motion to Dismiss, pp. 8-9). In response, petitioners acknowledged the state's "potential Eleventh Amendment immunity from state discrimination claims in Federal Court." Petitioners urged, however, if the federal ADEA claims were upheld, that the district court then retain jurisdiction over the

[4] Minnesota has since enacted legislation waiving its immunity from suit in federal court with regard to the ADEA and several other federal statutes. Minn. Stat. §1.05 (2001).

[5] Under local practice the motion and memorandum were not filed until early July, 1997.

supplemental state claims in order to avoid requiring "refiling of state claims in State Court with a federal claim based upon the same fact situation pending in Federal Court." (Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 9 n. 8). The University in response did not indicate whether it would still want the federal court to dismiss the state law claims if the federal claims were upheld, and it raised no questions regarding the permissibility of filing those state law claims in state court[6].

On July 11, 1997, the district court dismissed petitioners' federal and state claims "without prejudice." Petitioners appealed to the Eighth Circuit on July 14, 1997. The parties agreed that the federal appeal should be held in abeyance pending the circuit court's determination of the already pending appeal in *Humenansky*, and the court of appeals so ordered. *Humenansky* was decided by the Eighth Circuit on August 11, 1998; the court of appeals concluded that the ADEA could not constitutionally subject a nonconsenting state to suit in federal court. 152 F. 3d 812 (8th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000). A petition for rehearing in *Humenansky* was denied on November 18, 1998. In December 1998, petitioners asked the court of appeals to continue to hold their appeal in abeyance, noting that the United States had by then filed a petition for certiorari in *Kimel*. Although the University opposed further delay, the Eighth Circuit granted that request. Finally, in January 2000, following this Court's decision in *Kimel*, the

[6] The only comment on this issue in the University's memorandum was the assertion that "[P]laintiffs have conceded that the Eleventh Amendment bars their MHRA claim." (Defendant's Reply Memorandum of Law, p. 8).

Eighth Circuit granted petitioners' motion to dismiss their long pending appeal.

In the meanwhile, however, proceedings had begun in state court. On July 31, 1997, three weeks after the dismissal of their federal action, petitioners filed the instant case in Hennepin County District Court alleging a cause of action under the MHRA. The University's answer asserted several affirmative defenses, including that "[P]laintiff's claims are barred, in whole or in part, by the doctrine of election of remedies" and that "[P]laintiff's claims are barred, in whole or in part, by the applicable statute of limitations." (Answer, p. 3, ¶¶ 20, 21).

The University, however, did not initially seek dismissal on either of those grounds. Rather, it asked the state court to stay all proceedings pending disposition by the Eighth Circuit of the federal appeal. The University noted that the allegations of the state lawsuit were "identical" to those in the federal action, and argued, "[t]he University should not be required to defend against Plaintiffs' claims in more than one forum."[7] If petitioners' federal claims were ultimately reinstated, the University insisted, "Plaintiffs may elect to pursue their claims in either federal court or state court, *but not both*."[8] Despite petitioners' objections, the state court on October 29, 1997, ordered a stay of all proceedings. In August 1998, following the Eighth Circuit's decision in

[7] Defendants' Memorandum of Law in Support of Its Motion To Stay Action, p. 1; see *id.* at 3 ("Plaintiffs' maintenance of parallel actions requires the University to defend against identical claims in two different forums. Plaintiffs should not be allowed to pursue identical claims in two different forums"), 4 ("the Minnesota Court of Appeals has stated that courts should attempt to avoid 'piecemeal' litigation.")

[8] *Id.* at 5 (Emphasis added).

Humenansky, petitioners filed a motion asking that the stay be lifted. In successfully opposing that motion, the University again suggested that if the federal claim were reinstated, Plaintiffs would not be able to pursue their claims in both federal and state court. "In that event, Plaintiffs would be permitted to pursue their claims in either federal or state court and would presumably elect federal court since that was their forum of choice."[9] The motion to lift the stay was denied. When in December 1998, petitioners again asked the stay be lifted, the University objected that, "it is prejudicial and improper to require defendants to defend [this case] in two courts." Transcript of hearing December 17, 1998, p. 4. Finally, the state court in December 1998, issued an order lifting the stay for the limited purpose of permitting the University to move to dismiss on limitations grounds.

The University moved in February 1999, to dismiss the state action on the ground that it was barred by the 45 day state statute of limitations. In the state district court the University did not challenge the constitutionality of section 1367(d), but instead argued that that provision was inapplicable to the instant case because the federal court had never had subject matter jurisdiction over petitioners' ADEA claim. The state district court held that section 1367(d) did not apply, agreeing that the federal district court had never had jurisdiction over that federal claim. (Br. App. B2-B7).[10] "That a party may raise sovereign immunity based on the

[9] Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Lift Stay, p. 3.

[10] A page of the state district court opinion was inadvertently omitted from the copy of that opinion printed in the Appendix to the Petition. We have, therefore, reprinted in full the corrected district court opinion as an Appendix to this brief.

Eleventh Amendment as an 'affirmative defense' does not presuppose that the court had jurisdiction over the matter in the first place." (Br. App. B10-B11). With regard to equitable tolling, the court held that "[l]ack of clarity on a question of jurisdiction is sufficient grounds for invoking equitable tolling, particularly where there has been no demonstration of prejudice to the defendant." (Br. App. B8). But the state court held that equitable tolling was not authorized in this case because the court believed it was clear that the federal court had never had jurisdiction over Petitioners' supplemental MHRA claim. (Br. App. B10-B11).

The Minnesota Court of Appeals reversed. Relying on this Court's decision in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), it concluded that the existence of a possible Eleventh Amendment defense to the ADEA claim had not destroyed or vitiated the original jurisdiction of the federal court, at least not before that defense had been "successfully asserted." (Pet. App. A22). Section 1367(d) was therefore applicable to the instant case. With regard to tolling, the court of appeals held that the state district court had also erred in concluding that the Eleventh Amendment "destroys or vitiates subject matter jurisdiction over state law claims." (Pet. App. A23). "Given the lack of clarity in this area, Appellants' decision to file suit only in federal district court was legally sound and not based on their attorney's incorrect interpretation of the law." (Pet. App. A25). The court of appeals concluded that neither party had been prejudiced by the decision to file in federal court, and that any delay "was partly caused by the University's own actions." (Pet. App. A25).

> Perhaps more importantly, the University could have notified Appellants that it would not consent to suit in federal district court, thus allowing Appellants time to file in state court; rather the University waited nine months before asserting its Eleventh Amendment defense.

(Pet. App. A24-A25).

The Minnesota Supreme Court held the tolling provision of section 1367(d) unconstitutional as applied to a state agency (Pet. App. A9-A14), and concluded that the district court's decision to deny equitable tolling was not an abuse of discretion. (Pet. App. A14-A15).

SUMMARY OF ARGUMENT

Section 1367(d) was enacted to resolve a longstanding problem inherent in the existence of supplemental (formerly "pendent") jurisdiction. Claim preclusion principles generally require federal plaintiffs to include in their complaints any related state claims; a failure to do so will often bar a plaintiff from asserting those claims in a state court action. Decisions in numerous states have dismissed state court actions because the plaintiff had failed to attempt to bring the claim in an earlier federal suit. See Brief Appendix. Minnesota requires federal plaintiffs "to at least attempt joinder of their state claims in a federal action." *Buchanan v. Dain Bosworth, Inc.*, 469 N.W. 2d 508, 511 (Minn.Ct.App. 1991).

Claim preclusion has been successfully asserted by state defendants. Even though those defendants could have raised a sovereign immunity defense to any supplemental claim, defendants can and at times do choose not to assert that defense in federal court. *Wisconsin Dept. of Corrections v.*

Schacht, 524 U.S. 381, 389 (1998). Thus the mere availability of that possible defense does not clearly demonstrate that the federal court would not have exercised jurisdiction over the supplemental claim had it been raised.

Where a federal plaintiff does assert a state claim, but the federal court ultimately declines to exercise supplemental jurisdiction, the plaintiff may be barred from bringing a state court action because the state statute of limitations expired while the case was pending in federal court. Prior to 1990 the federal courts attempted to solve this problem in a variety of ways. Some courts retained supplemental jurisdiction over state claims they would otherwise have dismissed. "[E]xpiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin,* 930 F.2d 955, 963 (1st Cir. 1991)(opinion by Breyer, J.). Other courts conditioned dismissal of the supplemental claim on the execution by the defendant of a waiver of its limitations defense. *Financial General Bankshares, Inc. v. Metzger,* 680 F. 2d 768, 778 (D.C.Cir. 1982)(opinion joined by Ginsburg, J.)

Section 1367(d) replaced these differing and at times ineffective judicial solutions with a straightforward provision tolling the state limitations period during the pendency of the supplemental claim. This is similar to the manner in which, prior to 1789, courts of equity would protect litigants if they concluded that an action in equity should have been filed in a court of law. *Anonymous,* 1 Vern. 73, 22 Eng. Rep. 320 (1682). Congress has in other instances stayed the running of state limitations periods where necessary to protect important federal interests. 50 U.S.C. App. § 525.

The sovereign immunity of the states implicitly protected by the Constitution encompasses the right of the states to decide whether, and in what court, they can be sued. Section 1367(d) does not impinge on either of these prerogatives. If a supplemental claim is brought in federal court, and the state chooses to assert its sovereign immunity defense, the federal court will dismiss the claim, compelling the plaintiff to sue in state court if he or she wishes to pursue that state claim. Thus, sovereign immunity's "core concern is not implicated." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 51 (1994).

The system of supplemental jurisdiction of which section 1367(d) is a part affords an important choice to state defendants; they can decide not to assert their sovereign immunity defense to the supplemental claim, and thus litigate the state claim in the same proceeding as the federal claim, or they can choose to assert that defense and litigate the state and federal claims in separate actions. Section 1367(d) is necessary to assure that plaintiffs are not unfairly penalized where, as frequently occurs, state defendants do not make this choice until after the limitations period has expired.

ARGUMENT

I. SECTION 1367(d) RESOLVED AN IMPORTANT PROBLEM IN THE INTERRELATIONSHIP BETWEEN THE FEDERAL AND STATE JUDICIAL SYSTEMS

A. The Pre-1990 Attempts of the Federal Courts To Solve The Limitations Problem Regarding Supplemental Claims Were Awkward, Inconsistent and Not Fully Effective

The specific situation to which section 1367(d) is addressed derives from the existence of what until 1990 was known as pendent jurisdiction[11]. When an action arising under federal law is filed in a federal court, the "case or controversy" over which that court has jurisdiction encompasses all other claims or matters in dispute between the parties which arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Most often these supplemental claims are based on a state law applicable to the same events or transaction that are the basis of the federal claim.

A federal plaintiff with a related state claim ordinarily is as a practical matter compelled to include it as a supplemental claim in his or her federal action. The doctrine of claim preclusion bars a litigant from advancing in a second suit claims he or she could have raised in an earlier action. Restatement of Judgments (Second), § 25. Claim preclusion

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[11] In enacting section 1367, Congress used the phrase "supplemental jurisdiction" to encompass what had hitherto been referred to as pendent and ancillary jurisdiction. We use the terminology of the statute, although invariably the issues discussed in this brief involve what prior to 1990 was known as pendent jurisdiction.

applies where the first action was in federal court and the second in state court.

> If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories based on state law.

18 Moore's Federal Practice 3d, § 131.21(3)(d)(i), p. 131-50. Thus a plaintiff is generally required to invoke a federal court's supplemental jurisdiction by asserting related state claims. 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4412 p. 96.[12]

Where a plaintiff has brought a federal action raising only federal claims, most states will not permit the plaintiff to

[12] The Restatement of Judgments (Second) makes just this point:

> "A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealing as had been alleged in the federal action. Even if diversity of citizenship between the parties did not exist, the federal court would have had 'pendent' jurisdiction to entertain the state theory. Therefore *unless it is clear* that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred."

Section 25, comment 3, illustration 10 (emphasis added).

This rule is consistent with the standard for determining what state claims fall within a court's supplemental jurisdiction. Under *Gibbs* state law claims fall within that jurisdiction when, and precisely because, "a plaintif[f] . . . would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725.

maintain a separate state court action raising related state claims. We set forth in an Appendix to this brief a list of such state decisions[13]. In a number of instances *state agencies* have successfully invoked claim preclusion to bar such state court proceedings, even though a sovereign immunity defense would have been available to them if the state claim at issue had been included in the original federal complaint[14]. State courts have applied claim preclusion because the state defendant might have chosen not to assert that sovereign immunity defense had the state claim been brought in federal court, and that the plaintiff was thus obligated to attempt to do so.[15] Where a plaintiff has included a state supplemental claim in his or her federal action, on the other hand, state courts often will refuse

[13] On a number of occasions plaintiff's attorneys have been sued for malpractice for having failed to include such state claims in federal complaints. E.g., *Pitchell v. Williams*, 55 Conn. App. 571, 739 A. 2d 726 (1999); *Greene v. Payne, Wood and Littlejohn*, 197 A.D.2d 664, 602 N.Y.S.2d 883 (1993).

[14] *Bradley v. Georgia Institute of Technology*, 228 Ga.App. 216, 491 S.E. 2d 453 (1997); *Hall v. State of Hawaii*, 7 Haw. App. 274, 756 P. 2d 1048 (1988); *Shumaker v. Iowa Dept. of Transportation*, 541 N.W. 2d 850 (Iowa 1995); *Carter v. Southeastern Michigan Transportation Authority*, 135 Mich.App. 261, 351 N.W. 2d 920 (1984); *Blazer v. New Jersey Sports and Exposition Authority*, 199 N.J.Super. 107, 488 A. 2d 1025 (1985); *Johnson v. Chaney*, 1999 WL 671248 (Tex. App.-Hous.)(Texas Dept. of Corrections a codefendant); *Sattler v. Bailey*, 184 W.Va. 212, 400 S.E. 2d 220 (1990)(West Virginia Dept. of Public Safety a codefendant).

[15] *Shumaker v. Iowa Dept. of Transportation*, 541 N.W. 2d 850, 853 (Iowa 1995)("Shumaker contends that the court would not have exercised pendent jurisdiction over her state claim because the Eleventh Amendment deprived it of subject matter jurisdiction to consider her state claim. However, the Eleventh Amendment does not raise a matter of subject matter jurisdiction. While it may be raised as a defense, it can be waived by consent or a voluntary appearance, by statute, or by the state's conduct in the suit.")

to permit the filing of a state action raising the state claim until and unless there has been a final determination that the federal courts will not exercise jurisdiction over that state claim.[16]

Minnesota law is particularly strict in this regard. "[T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot . . . split up his claim." *Gulbranson v. Gulbranson*, 408 N.W. 2d 216, 218 (Minn.Ct.App. 1987)(*quoting United States v. California and Oregon Land Co.*, 192 U.S. 355, 358 (1904))[17]. The filing of a federal action will preclude a state court claim arising out of the same transaction or occurrence unless it is "clear" the federal court would not have exercised supplemental jurisdiction over that state law claim[18]. Minnesota courts generally "requir[e] plaintiffs to at least attempt joinder of their state claims to a federal action." *Buchanan v. Dain Bosworth, Inc.*, 469 N.W. 2d 508, 511

[16] E.g., *L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506 (Ala. 1984); *International Games, Inc. v. Sims*, 111 Ill. App. 3d 922, 444 N.E. 2d 736, 67 Ill. Dec. 500 (1982); *City of Los Angeles v. Superior Court*, 149 Cal. Rptr. 320, 324, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978).

Simultaneous litigation of federal and state actions will often be precluded as well by state law regarding claim splitting or election of remedies.

[17] *Hauser v. Mealey*, 283 N.W. 2d 803, 807 (Minn. 1978)("It is well established in Minnesota that a party 'should not be twice vexed for the same cause'"); see *Loo v. Loo*. 520 N.W. 2d 740, 744 n. 1 (Minn. 1994) (disapproving claim splitting); *Matter of Minneapolis Community Dev. Agency*, 359 N.W. 2d 687, 690 (Minn.Ct.App. 1984)(same); *Mattsen v. Packman*, 358 N.W. 2d 48, 50 (Minn. 1984)(same); *Travelers Indemnity Co. v. Vaccari*, 245 N.W. 2d 844, 847 (Minn. 1976)(same).

[18] *Buchanan*, 469 N.W. 2d 508, 511 (Minn. Ct. App. 1991). In deciding whether a state claim should have been included in a federal complaint, Minnesota courts used the common nucleus of operative fact standard applied in federal courts. *Anderson v. Werner Continental, Inc.*, 363 N.W. 2d 332, 335 (Minn. Ct. App. 1985).

(Minn. Ct. App. 1991). Thus the fact that including a supplemental state claim is or may be *possible* under federal law makes such inclusion *mandatory* under Minnesota law.

Where a plaintiff does include that state claim in his or her federal complaint, however, the underlying federal claim may subsequently be dismissed at a point in the litigation when the state law claim has yet to be resolved. If that occurs, the court must decide whether to dismiss the state law claim or to retain jurisdiction over and resolve that claim. If an order of dismissal is entered, that is usually done with the understanding that the remaining state claim will (at least if the plaintiff still wants to pursue it) be resolved in state court. In general "[f]ederal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation." *United Mine Workers v. Gibbs*, 383 U.S. at 726 n. 15 (*quoting Strachman v. Palmer*, 177 F. 2d 427, 431 (1st Cir. 1949)).[19]

Dismissal of a supplemental claim poses a special problem, however, if the state statute of limitations has run since the commencement of the original federal action. Prior to 1990, the lower courts dealt with this situation in a number of different ways. Some courts refused to dismiss a supplemental claim unless the defendant would first agree to waive the state statute of limitations. The District of Columbia Circuit, in an opinion joined by then Judge Ginsburg, took this approach in *Financial General*

[19] *Gibbs* explained that, even where the underlying federal claim was itself retained, there would be situations in which it would be best if "the state claims [were] dismissed without prejudice and left for resolution to state tribunals." 383 U.S. at 726-27. Dismissal of state law claims, for example, might be preferable where it would "promote justice between the parties, by procuring them a surer-footed reading of applicable law" from state courts. 383 U.S. at 726.

Bankshares, Inc. v. Metzger, 680 F. 2d 768 (D.C.Cir. 1982). Having concluded that it was inappropriate in that case for the district court to exercise supplemental jurisdiction over a common law claim, the appellate court remanded

> with instructions not to dismiss the case until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations.

680 F. 2d at 778. The Seventh Circuit issued a similar order in *Duckworth v. Franzen*, 780 F. 2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.)[20].

Many courts instead took the position that the expiration of the state limitations period was by itself a reason to retain jurisdiction over the supplemental claim[21]. Some appellate decisions held that retention of such a claim was mandatory if the plaintiff could no longer refile his or her claim in state court[22]. Other decisions adopted a less rigid rule, requiring

[20] Defendants were also required to agree to such waivers in *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(waiver required by district court); *Saulsberry v. Atlantic Richfield Co.*, 673 F. Supp. 811, 816 (N.D.Miss. 1987), *Brewer for Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D.Cal. 1987), and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 657 F. Supp. 1037, 1040 (D.Ariz. 1987).

[21] A number of lower court decisions, without announcing a clear legal standard, relied on this circumstance in deciding to retain jurisdiction over a supplemental claim. E.g., *Hansen v. Lamontagne*, 808 F. Supp. 89, 95 (D.N.H. 1992); *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989, 999 (N.D.Ga. 1992); *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 690 (N.D.Ga. 1983).

[22] *Edwards v. Okaloosa County*, 5 F. 3d 1431, 1435 (11th Cir. 1993)(pre-1990 claim); *Evans & Associates v. Continental Homes*, 785 F. 2d 897, 917 (11th Cir. 1986); *Emory v. Peeler*, 756 F. 2d 1547, 1555

only that the district judge give consideration to the expiration of that limitations period in deciding whether to dismiss the supplemental claim[23]. The First Circuit, in an opinion written by then Judge Breyer, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin*, 930 F. 2d 955, 963 (1st Cir. 1991)[24].

Yet a different approach was to dismiss the supplemental claim, but later to entertain a motion to reconsider that

(11th Cir. 1985); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984); *Henson v. Columbus Bank and Trust Co.*, 651 F. 2d 320, 325 (5th Cir. 1981); *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 63 (7th Cir. 1979); *Hector v. Weglein*, 558 F. Supp. 194, 207 (D.Md. 1982); see *Beck v. Prupis*, 162 F. 2d 1090, 1100 (11th Cir. 1998)(failure to retain jurisdiction where statute of limitations has expired "will often constitute an abuse of discretion.")

[23] *Notrica v. Board of Supervisors of County of San Diego*, 925 F. 2d 1211, 1215 (9th Cir. 1991); *Prater v. United Mine Workers*, 793 F. 2d 1201, 1208 (11th Cir. 1986); *Garner v. Pearson*, 732 F. 2d 850, 854 (11th Cir. 1984); *Transource Intern, Inc. v. Trinity Industries, Inc.*, 725 F. 2d 274, 290 (5th Cir. 1984); *Quality Foods v. Latin Am. Agribusiness Devel.*, 711 F. 2d 989, 999-1000 (11th Cir. 1983); *Ransom v. S & S Food Center, Inc.*, 700 F. 2d 670, 678 (11th Cir. 1983); *Stein v. Reynolds Securities, Inc.*, 667 F. 2d 33, 34 (11th Cir. 1982); *Pharo v. W.L.Smith*, 625 F. 2d 1226, 1227 (5th Cir. 1980); *Finkelstein v. Barthelemy*, 678 F. Supp. 1255, 1261 (E.D.La. 1988); *Haber v. County of Nassau*, 411 F. Supp. 93, 99 (E.D.N.Y. 1976); *Blake v. Town of Delaware City*, 411 F. Supp. 1189, 1204 (D.Del. 1977).

[24] See *Giardiello v. Balboa Ins. Co.*, 837 F. 2d 1566, 1571 (11th Cir. 1988)(limitations bar "an important concern"); *Rodriguez v. Doral Mortgage Corp.*, 57 F. 3d 1168, 1177 (1st Cir. 1995)(existence of statute of limitations bar "a salient factor" in determination whether to retain jurisdiction); *Rutledge v. Aluminum, Brick & Clay Workers Union*, 737 F. 2d 965, 970 n. 7 (11th Cir. 1984)(district courts "encouraged" to retain jurisdiction); *Eisert v. Town of Hempstead*, 1996 WL 50022 * 7 (E.D.N.Y.) (citing *Newman*).

dismissal if the state courts in the interim had rejected the claim on limitations grounds.[25] But plaintiffs who sought to file the state law claim in both federal and state court faced dismissal by the state courts for splitting their claims.[26] A number of the cases in which these issues arose involved state defendants.[27]

This Court dealt with a closely related problem in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). The complaint in that case had initially been filed in state court; after it was removed to federal court, the plaintiffs withdrew their federal claim. The question at issue was whether the district court should remand the state claim or dismiss it; the distinction was of potentially controlling importance, since the state statute of limitations had by then run. This Court held that the expiration of that limitations period was "a potent reason for giving federal courts

[25] *Rheaume v. Texas Dept. of Public Safety*, 666 F. 2d 925, 931-32 (5th Cir. 1982); *Henson v. Columbus Bank and Trust Co.*, 651 F. 2d 320, 325 (5th Cir. 1981).

[26] See n. 16, *supra*; cf. *Notrica v. Board of Supervisors of County of San Diego*, 925 F. 2d 1211, 1213 (9th Cir. 1991)(state court claim dismissed for lack of prosecution while plaintiff was pursuing federal court action).

The unwillingness of state courts to entertain such duplicative lawsuits is understandable. If plaintiffs filed both federal and state lawsuits but then tried to resolve the issues in the federal proceeding, "[s]tate courts could hold cases on their dockets for years awaiting the outcome of litigation in federal court. Requiring a plaintiff to file in both state and federal court would only undermine *Gibbs'* purpose of promoting judicial economy, convenience and comity." *Edwards v. Okaloosa County*, 5 F. 3d 1431, 1434 (11th Cir. 1993).

[27] E.g. *Notrica v. Board of Supervisors of San Diego*, 925 F. 2d 1211 (9th Cir. 1991)(state of California a co-defendant); *Cooley v. Pennsylvania Housing Finance Agency*, 830 F. 2d 469 (3d Cir. 1987); *Rheaume v. Texas Dept. of Public Safety*, 666 F. 2d 925, 931-32 (5th Cir. 1982).

discretion to remand" such claims. 484 U.S. at 352. The Court also rejected the suggestion that the federal court should simply retain jurisdiction of such removed claims rather than remand them. That solution, it explained, was

> far from satisfying. Under petitioners' suggested approach, district courts would retain jurisdiction over cases that apart from the statute-of-limitations concern properly belong in state courts. There is no reason to compel or encourage district courts to retain jurisdiction over such cases when the alternative of a remand is readily available.

484 U.S. at 352-53 n. 10. But in the more typical case where the complaint had originally been filed in federal court, the alternative of a remand was not available at all.

The alternatives that were available to the federal courts in such cases all had serious drawbacks. The waiver technique was not always successful; a defendant was always free to refuse to agree, because it wanted to stay in federal court or because it hoped the court might relent and dismiss the case anyway[28]. Courts using this approach had to decide what possible defenses would be included in the waiver.[29] In a circuit where expiration of the limitations period was merely one factor bearing on the district judge's decision, the result

[28] E.g., *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 65 (7th Cir. 1979); see *Knuth v. Eri-Crawford Dairy Cooperative Ass'n*, 325 F. Supp. 48, 57 n. 11 (W.D.Pa. 1971)(defendant, which had not offered waiver at trial, later relented and agreed during oral argument on motion to dismiss supplemental claim).

[29] *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(retention of jurisdiction required where it appeared that waiver ordered was insufficiently broad).

could vary unpredictably from case to case[30]. In all of these cases, particularly where retention of jurisdiction was at issue, federal judges were required to interpret state limitations law[31]. That sometimes difficult task was compounded where the defendant was assuring the federal judge that there would be no limitations problem[32], while the plaintiff expressed concerns to the contrary.

These varied and imperfect judicial solutions adversely affected both state and federal interests. Retention of jurisdiction, as the Court noted in *Carnegie-Mellon*, meant that cases which belonged in state court would remain in federal court. Federal courts properly concerned not to inadvertently wipe out a plaintiff's claim were retaining jurisdiction over cases merely because it was possible, but not certain, that the state courts would have been unwilling to hear them[33].

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[30] See *Burns-Toole v. Byrne*, 11 F. 3d 1270, 1276 (11th Cir.)(refusal to retain jurisdiction not abuse of discretion despite expiration of limitations period), *cert. denied*, 512 U.S. 1207 (1994).

[31] E.g., *Burrows v. Turner Memorial Hosp., Inc.*, 762 F. Supp. 840, 843-44 (W.D.Ark. 1991)(initial order retained jurisdiction because of limitations problem; later order dismissed supplemental claims after concluding statute of limitations would not actually be a bar); *Green v. Jackson County State Bank*, 1987 WL 14376 * 6 (S.D.Tex.)(noting difficulty in interpreting state law); see n. 33, *infra*.

[32] *Financial General Bankshares, Inc. v. Metzger*, 680 F. 2d 768, 778 (D.C.Cir. 1982).

[33] E.g., *Duckworth v. Franzen*, 780 F. 2d 645, 657 (7th Cir. 1985)(ordering waiver due to "uncertainties" as to whether complex state limitations rules would bar filing in state court); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(forbidding dismissal of pendent claims because court "did not know whether [plaintiff] could reassert its state claims in Alabama courts"); *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 65 (7th Cir. 1979)(retention of jurisdiction required where "it would appear" plaintiff could not refile claim in state court); *Sun Dun, Inc. v. Washington Coca-*

On the other hand, as this Court explained in *Carnegie-Mellon*, the danger that state law claims might ultimately be forfeited because they had been brought as supplemental claims in federal court created a risk of coercing litigants into abandoning their federal claims entirely.

> [I]f a plaintiff . . . knows that, notwithstanding the expiration of a statute of limitations, a federal court . . . must dismiss the case upon deciding that the exercise of pendent jurisdiction would be inappropriate, the plaintiff may well decline to allege any federal-law claims. . . . Such protection will appear especially attractive to a plaintiff who has any doubt about the validity of his federal-law claim.

Carnegie-Mellon, 484 U.S. at 352 n. 9. Litigants might also be reluctant to risk their state law claims by asserting federal claims in federal court where, as here[34], the remedies afforded under state law are more comprehensive. In either circumstance, the risk of a limitations-based forfeiture of state

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Cola Co., 740 F. Supp. 381, 394 (D.Md. 1990)(retaining jurisdiction because statute of limitations "might" bar claim); *Blake v. Town of Delaware City*, 411 F. Supp. 1189, 1204 (D.Del. 1977)(retaining jurisdiction because statute of limitations "might" bar refiling claim in state court); *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 74 F.R.D. 151, 154 (S.D.N.Y. 1977), (district court declined to dismiss pendent claims because "it is uncertain what statute of limitation applies. . . . It would work a harsh injustice on plaintiff . . . if we were to dismiss his claims and it was later determined that he was barred by the statute of limitations because of the time that had elapsed while the case was before us"), *rev'd on other grounds, Federman v. Empire Fire and Marine Ins. Co.*, 597 F. 2d 798 (2d Cir. 1979).

[34] Minnesota law, for example, authorizes compensatory and punitive damages in an age discrimination case. Minn. Stat. § 363.071(2). Neither of those remedies is available under the ADEA.

law claims may "chill . . . plaintiffs from bringing their federal-law claims." *Id.* Such a result was particularly inappropriate where Congress expressly intended that federal and state remedies be complementary. The pre-1990 judicial responses were incapable of avoiding this chilling effect. Because standards varied between and even within circuits, and because of the element of discretion in many appellate opinions, litigants could not be confident that they would not forfeit their state law claims if they attempted to proceed in federal court.

B. Section 1367(d) Provided A Sensible and Balanced Solution to the Problem

In 1990 Congress replaced this mix of ad hoc judicial responses with a single statutory solution[35]. Under section 1367(d) the state statute of limitations is tolled from the commencement of the federal action until the date on which it ends. This affords a plaintiff an opportunity to seek to litigate his or her state law claims in federal court without running the risk that those claims will ultimately be forfeited because of the state statute of limitations.

> It is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous. Moreover, it is clearly in the interest of sound judicial administration to adopt a procedure under which a plaintiff need not file simultaneous actions in two courts in order to ensure that his action will not be barred by the statute of limitations following a dismissal in one of them.

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, pp. 453-54 (1968). Because the protections of section 1367(d) are clear, uniform, and predictable, plaintiffs and defendants alike can anticipate the consequences of raising and opposing supplemental claims. Unlike the court-required waiver, section 1367(d) does not depend for its efficacy on the cooperation of the defendant. And, unlike the practice of retaining supplemental jurisdiction, section 1367(d) eliminates the need for federal judges to keep cases which would otherwise sensibly be left to the state courts.

It is assuredly appropriate for Congress to protect litigants who in good faith seek to enforce their legal rights in federal court. Federal law prohibits retaliation against federal litigants because they sought redress in federal court. 18 U.S.C. § 1513 (retaliation against party or witness). A state law which penalized an individual for seeking federal judicial redress--such as by imposing a forfeiture of any related state law claim against the same defendant--would undoubtedly be invalid. See *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967); cf. 29 U.S.C. § 623(d) (prohibiting employers from retaliating against employees for opposing violations of the

[35] The approach taken by section 1367(d) apparently derives from an earlier proposal adopted by the American Law Institute. Study of the Division of Jurisdiction Between State and Federal Court, pp. 65 , 453-57 (1968). The ALI had suggested that a tolling provision be adopted for all claims initially filed in federal court which that court concluded should have been filed in state court.

The proposal appears to stem from an article by Professor Herbert Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code", 13 Law and Contemp. Probs. 216, 233 (1948).

ADEA). The refusal of state law (or, as here, the refusal of a state judge) to toll a state limitations period while the plaintiff seeks to enforce that state right in federal court, although not the result of any improper motive, will have the same punitive impact as an intentional act of retaliation.

Utilization of a tolling rule is a longstanding solution to the type of problem to which section 1367(d) is addressed. Both federal[36] and state statutes provide for tolling where several different forums are provided in which a party can seek redress. This same solution was available prior to the adoption of the Constitution where a court in equity concluded that a claim before it should have been filed in a court of law, but the underlying limitations period had expired since the commencement of the equitable action. In such cases the equity court would intervene to prevent the limitations bar from precluding the action at law.

> Upon a motion, the Lord Chancellor declared, that if a man sued in Chancery, and pending the suit here, the statute of limitations attached on his demand, and his bill was afterwards dismissed, as being a matter properly determinable at common law: in such case his Lordship would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded in bar to his demand.

[36] E.g., 8 U.S.C. § 1182(a)(9)(B)(iv) (period of illegal residence in the United States triggering inadmissibility tolled during period of application for change of status); 15 U.S.C. § 6606(e)(4) (limitations period for Y2K action tolled during period of notice and remediation); 28 U.S.C. § 2263(b) (180 day period to file federal habeas petition tolled during pendency of certiorari petition and first state post-conviction proceeding); 29 U.S.C. § 1854(f) (period to file certain actions by farmworkers tolled during pendency of related state workers compensation proceeding).

Anonymous, 1 Vern. 73, 22 Eng. Rep. 320 (1682)[37]. A similar rule existed where an action was originally commenced in an inferior court of law, and later refiled in a law court of greater authority[38]. An analogous practice exists today where a defendant asserts that the court in which an action is filed is a forum non conveniens; where that objection is sustained, the court may require, as a condition of dismissal, that the objecting party waive any statute of limitations or other bars to a new proceeding in the forum deemed more appropriate. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

Congress has on other occasions stayed the running of state limitations periods to protect important federal interests. During World War I Congress adopted the Soldiers and Sailors Relief Act, which provided in part that the state limitations periods applicable to the claims of military personnel would

[37] See *Gilbert v. Emerton*, 2 Vern. 503, 23 Eng. Rep. 922 (1705)(Lord Keeper directed "that the plaintiff should bring his action [at law], and the defendant not to insist on the statute of limitations"); *McKenzie v. Marquis of Powis*, 7 Brown 282, 288, 3 Eng. Rep. 183, 187 (1737)(in order dismissing equitable action court directed that in any "action or actions to be brought at law, the respondent . . . shall not be permitted to plead or insist on the statute of limitations"); *Sturt v. Mellish*, 2 Atk. 611, 26 Eng. Rep. 765 (1743)("But if the plaintiff should have a mind to bring an action at law upon the promise pretended to be made . . . , I will direct that the time which has run during the pendency of this suit, shall not be taken advantage of at law.")

[38] Joseph Angell, A Treatise on the Limitation of Actions at Law and Suits in Equity, pp. 322-23 (Boston 1829)("the commencement of an action in an *inferior* court will prevent the statute from attaching to the cause of action. And it has been held, in the court of King's bench, that if an action be commenced in an inferior court, and then removed by *habeas corpus*, and they proceed anew, the commencement serves to prevent the statute. . . . [N]ot that this [King's Bench] suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right.")

be suspended during the period of their military service. 40 Stat. 440, 443, § 205. A similar provision still protects men and women serving in the armed forces. 50 U.S.C. App. § 525[39]. A related provision was enacted during the Civil War. 13 Stat. 123. The impact of section 1367(d) is significantly more modest than section 525. Under section 1367(d) the tolling period will begin only *after* the defendant has been notified of the commencement of legal proceedings against it, albeit in what ultimately proves to be the wrong court; under section 525, on the other hand, a defendant could be entirely unaware of the continued existence of a tolled claim.

II. SECTION 1367(d) DOES NOT VIOLATE THE SOVEREIGN IMMUNITY OF THE STATES

A. An Act of Congress Can Be Invalidated Only On A Clear Showing That It Violates The Core Concerns of Sovereign Immunity

Although the Minnesota Supreme Court characterized the asserted constitutional flaw in section 1367(d) as a violation of the state's Eleventh Amendment immunity, the constitutional question raised here actually is about sovereign immunity. The two, of course, are closely related; this Court has repeatedly explained that the specific limitation written

[39] Section 525 provides in pertinent part:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law . . . for the bringing of any action or proceeding in any court . . . by . . . any person in the military service . . . whether such cause of action or right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service."

into the Eleventh Amendment itself was an application of a broader principle of state sovereign immunity widely accepted by the framers of the Constitution and implicit in the original constitutional plan. *Alden v. Maine*, 527 U.S. 706, 723-7 (1999).

The decisions of this Court have in the past recognized a constitutionally protected sovereign immunity where it was clear that the framers of the Constitution had a specific understanding that the state interest in question was one with which Congress would not have the power to interfere. "We seek to discover . . . what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system." *Alden v. Maine*, 527 U.S. at 758. "[T]he ratification debates and events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit [and] underscore the importance of sovereign immunity to the founding generation." *Id.* at 726-27. Most importantly, "the *contours* of sovereign immunity are determined by the Founders' understanding." *Alden v. Maine*, 527 U.S. at 734 (Emphasis added).

Applying this demanding standard, this Court has found "clear" (*id.* at 726) and "conclusive evidence" (*id.* at 727) that the framers understood that sovereign immunity protected two specific, identified state interests--the right to decide whether a state could be subject to suit, and the right to determine in which court the state could be sued. *Nevada v. Hall*, 440 U.S. 410, 414 (1979). "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). (Emphasis original). Regarding both suits against a nonconsenting state in

federal court, and suits against a nonconsenting state in state court, this Court concluded that "it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts", *Alden,* 527 U.S. at 727, or to subject the states generally to suit in federal court. *Id.* at 727 (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n. 2 (1985)). Thus this Court has found a state's constitutional immunity to be implicated only where a nonconsenting state was named as a defendant in federal[40] or state[41] court, or where a nonconsenting state was the real party in interest in an action in which the nominal defendant was an individual[42]. This Court cautioned in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979), that there was "no justification for reading additional meaning into the limited language of the [Eleventh] Amendment."

The care with which this Court has delineated the scope of the interests protected by a state's constitutional sovereign immunity stems in part from the fact that the text of the Constitution itself provides no guidance. "[T]he constitutional principle of sovereign immunity . . . is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution." *Alden v. Maine*, 527 U.S. at 730. Constitutional principles that were only implicit in the system of federalism may be as important as explicit

[40] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Hans v. Louisiana*, 134 U.S. 1 (1890).

[41] *Alden v. Maine*, 527 U.S. 706 (1999).

[42] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974).

constitutional text, but they are assuredly more difficult to define and delineate.

This case involves neither Minnesota's right to decide whether it can be subjected to suit, nor its right to determine where such a suit may be litigated. Section 1367(d) assuredly is not the "functional equivalent" of a federal law authorizing suits against a nonconsenting state in federal or in state court. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997). Rather, the question here is whether federal procedural provisions of general application and of otherwise unquestioned validity may be unconstitutional when applied to a state agency.

B. The System of Federal Supplemental Jurisdiction Of Which Section 1367(d) Is A Part Respects The Core Concerns of Sovereign Immunity

The scope of federal supplemental jurisdiction itself has been construed in a manner consistent with the two established aspects of state sovereign immunity. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 117-23 (1984). First, if a state chooses not to allow any suits against state agencies or entities, federal supplemental jurisdiction does not provide a basis for suing the nonconsenting state in federal court. Second, if a state has chosen to permit such actions but to allow them only in state court, federal courts cannot exercise supplemental jurisdiction over the objections of the state. In both instances the state need only assert its immunity defense in a manner and at a time consistent with federal procedure. If a federal complaint includes a supplemental claim against such a state, the state can readily obtain prompt dismissal of that claim simply by filing an

appropriate motion under Rule 12(b)(6). Thus "the Eleventh Amendment's core concern is not implicated." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 51 (1994).

Supplemental jurisdiction, however, also affords to the state a third type of choice, one which only the federal law could create. Where Congress has created a federal cause of action arising out of the same circumstances as a state law claim against a state defendant, the existence of supplemental jurisdiction usually means that the states will have two options; the state can either litigate the state law claims together with related federal claims in federal court, or assert a sovereign immunity defense to the state law claims and force the plaintiff to pursue them in state court[43].

> The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 389 (1998). Indeed, unless a state has chosen to raise the matter, a federal court could not dismiss a claim on sovereign immunity grounds.[44] So long as its choice is exercised in conformity

[43] Supplemental jurisdiction often effectively requires plaintiffs to either include supplemental state law claims or abandon them; anti-claim splitting rules, election of remedies and claim preclusion principles and the burdens of having to litigate related claims in two different courts will usually leave plaintiffs with little alternative.

[44] The state district court erred in concluding that "under *Pennhurst* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims." (Pet. App. A-14). Until and unless

with federal procedure, the selection of the forum in which the state claim will be heard is left entirely to the discretion of the state.

A state may prefer to defend a supplemental state claim in federal court to avoid the expense and inconvenience of having to try the federal and state claims in separate proceedings. That option may also be attractive where state law claims will in any event be tried in federal court against other defendants; by acquiescing in the adjudication by the federal court of the supplemental claims against the state as well, the state may be able to share the burdens of litigation with counsel for the other defendants, and be able to avoid the risk that, in the absence of a joint defense, the federal court defendants might make litigation decisions contrary to the interests of the state in the parallel state court action. The assertion of a supplemental claim against a state accords the state the option of taking advantage of these benefits, or of rejecting them and insisting that the plaintiff pursue the proposed state claim in state court.

Federal practice also affords the state an opportunity to postpone deciding whether to assert its sovereign immunity defense until it is clear whether the federal claim will survive

the University actually sought dismissal on the basis of its sovereign immunity defense, the exercise of such jurisdiction was entirely proper. "[T]he State's participation as a defendant would not automatically have placed the [claim] outside the federal courts' jurisdictional authority. That is because . . . the State might not have asserted the [sovereign immunity] defense in federal court, but could have decided instead to defend on the merits." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 390 (1998). "The [Eleventh] Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 266 (1997).

to trial.[45] Federal law might, for example, have required a state defendant to decide within 30 days of the filing of the complaint whether to assert its sovereign immunity defense. See 28 U.S.C. § 1447(c). That would have forced a state to exercise its option before it knew whether relinquishing that defense was actually necessary to avoid defending related claims in both federal and state courts. But under *Gibbs* and section 1367(c)(3) the federal courts generally reconsider whether to retain jurisdiction over a supplemental claim if the underlying federal claim is dismissed.

States in theory might make by statute the choices accorded to them by federal supplemental jurisdiction, enacting legislation that requires state lawyers to object to all supplemental claims against the state, or that forbids them from ever doing so. At least ordinarily, however, state laws leave to the attorneys representing state agencies the authority to decide in each case whether the interests of the state would be better served by objecting to or acquiescing in the exercise of supplemental jurisdiction over a given claim against the state. Thus the University of Minnesota has chosen in some instances to defer asserting sovereign immunity until after the dismissal of the underlying federal[46] claim, and in others to seek a decision on the merits of both the federal and supplemental claims[47]. In *Katz v. Regents of University of*

[45] In *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998), Justice Kennedy suggested that a state could not defer asserting its sovereign immunity until after a decision on the merits had been rendered against it in the trial court.

[46] *Richmond v. Board of Regents of the University of Minnesota*, 957 F. 2d 595, 599 (8th Cir. 1992).

[47] *Eldeeb v. University of Minnesota*, 864 F. Supp. 905, 908 (D.Minn. 1994).

California, 229 F. 3d 831 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1989 (May 14, 2001), the state defendant won a jury verdict on both the federal and supplemental claims, and then successfully resisted the plaintiff's argument that there had been no federal jurisdiction over the latter. In practice state defendants in a wide variety of circumstances have chosen to litigate in federal courts supplemental claims related to federal claims that were in any event going to be tried there. (See Petition for Writ of Certiorari, pp. 10-11 and nn. 3-11).

In the instant case the University of Minnesota took full advantage of the tactical opportunities accorded by federal law. At the beginning of the litigation, before developments in the law called into question the viability of the federal ADEA claim, the defendant made no active effort to assert sovereign immunity or to force litigation of the state law claims into state court. Rather, counsel for the University engaged in extensive discovery, and was litigating the state and federal claims together. Only when, following the decision in *Humenansky*, the defendant moved to dismiss the federal claim, did the defendant actually ask the federal court to dismiss the supplemental claim because of sovereign immunity[48]. If the constitutional issue in *Humenansky* and

[48] The Minnesota Supreme Court somewhat mischaracterized the events below when it asserted, "[t]he University did not consent; instead, it asserted Eleventh Amendment immunity as an affirmative defense in its answer in the federal court, and later as a basis for the motion to dismiss in federal court." (Pet. App. A10). As the state court of appeals recognized, (Pet. App. A24-A25), the nine months between the answer and the motion to dismiss are of considerable importance. Although the defendant's failure during this period to assert its sovereign immunity defense did not irrevocably waive that defense, the mere filing of an answer with a boilerplate assertion that the complaint was "barred in whole or part" by the Eleventh Amendment did not constitute a serious effort to obtain on that basis dismissal of the supplemental claims.

later *Kimel* had been resolved in favor of plaintiff, it is certainly conceivable--perhaps even likely--that the University would ultimately have withdrawn its effort to shift the supplemental claim out of federal court. All of these tactical decisions were entirely proper; the University was simply utilizing the choices provided by federal law in the same manner many defendants would have chosen.

However, the discretion that federal law accords to state defendants in asserting a sovereign immunity defense carries with it the very problem that section 1367(d) in turn addresses. A legal regime in which state defendants are permitted to and do decide only *after* the filing of a complaint whether to oppose or acquiesce in the exercise of supplemental jurisdiction is necessarily one in which the plaintiffs cannot know at the time of the filing of the complaint whether or not they will be able to litigate that claim in federal court. Petitioners received their right to sue letters in June and July, 1996, and were required to decide by the end of August 1996 whether to file their state law claim in federal or state court. Not until the spring of 1997, however, did the University decide to be a nonconsenting state defendant, and not until its June 1997 motion did the University actually request dismissal of the supplemental state claim. The University's motion occurred many months after the expiration of the state statute of limitations.

C. A State's Constitutionally Protected Sovereign Immunity Is Not Implicated Merely Because A Federal Statute May "Affect" The Outcome of An Action To Which The State Has Consented

Section 1367(d) does not interfere with the ability of a state to determine whether, or in what court, it may be subject to suit. The Minnesota Supreme Court, however, believed that the Constitution would be violated by any federal law that would in any way "affect the liability of the University as to a state law claim in state court." (Pet. App. A9-A10). This sweeping statement finds no support in the decisions of this Court, which until now have identified as constitutionally protected only a state's authority to determine whether and in what court a state could be sued.

The very existence of supplemental jurisdiction can "affect the liability" of a state agency, since often it will as a practical matter force the state to agree to federal jurisdiction--with its different practices and procedures--to avoid duplicative trials. Even where the state insists that the state claims be litigated in state court, the ongoing federal proceeding may have a substantial, perhaps even dispositive impact. Testimony elicited or documents discovered in the federal proceeding against a state agency or individual state officials, for example, might prove determinative in a later state law action against the agency. A successful action in federal court may collaterally estop the state defendant from asserting factual or legal defenses in the state court action.

The decisions of this Court have only invalidated acts of Congress based on a far more serious interference with state sovereign immunity. *Alden v. Maine* struck down congressional efforts to force the state courts to hear FLSA

cases against a state on the ground that in 1789 there was a specific identifiable legal tradition protecting the authority of a sovereign to make that decision itself. 527 U.S. at 713, 724, 728. No such tradition, however, exists with regard to tolling rules or statutes of limitations, and there is no showing here--as there was in *Alden*--that the issue in this case was one the framers actually had in mind, or about which their reaction is at all knowable. The solution adopted by Congress to solve the problem in this case is the same solution that had existed in 1789 to deal with the analogous problem regarding courts of law and courts of equity. It is scarcely to be believed that ratification of the Constitution would have been imperiled by a suggestion that Congress might be authorized to adopt legislation such as section 1367(d).

The specific question at issue here--whether the limitations period in this case should have been tolled while the federal supplemental claim was pending--can hardly be characterized as an issue about sovereign immunity. The state statute allowing actions to be brought against state agencies under the Minnesota Human Rights Act says nothing about tolling one way or the other. There is not even a state statute forbidding tolling with regard to state agencies or defendants generally; to the contrary, state law clearly accords to state district judges discretion to toll statutes of limitations. (Br. App. B7-B11; Pet. App. A14, A24-25). The decision of the state trial judge to refuse to toll the limitations period appears to have rested, not on any application of state law, but on a misunderstanding of federal law[49].

A more substantial constitutional question might arise if the Minnesota legislature, in authorizing actions against the

[49] See n. 44, *supra*.

state under the Minnesota Human Rights Act, had expressly provided that that waiver of sovereign immunity was conditioned on a bar to any tolling of the statute of limitations. But the waiver of the state's immunity contains no such specific limitations. If Minnesota law regarding tolling does not authorize tolling in the circumstances of this case, that would be because of tolling standards that are part of the general law of the state, applicable to private and governmental defendants alike. A state's waiver of its sovereign immunity cannot fairly be said to encompass as a condition of that waiver adherence to the entire corpus of statutory, rule-based and court-made state procedural law. Minnesota procedure differs in countless particulars from federal law; assuredly that does not mean that a state agency, if sued in federal court, could insist that the litigation of any supplemental claim be conducted according to Minnesota procedure[50].

The modest impact of section 1367(d) on a state bears no relationship to the severe invasion of state immunity involved in *Garrett, Kimel and Alden*. Minnesota having ultimately raised its sovereign immunity defense, the action under the Minnesota Human Rights Act will be litigated in Minnesota district court, precisely as provided for in the Act. The standards of liability and scope of remedies will be as specified in the MHRA itself. The University received notice within the time period provided by state law, albeit notice of a proceeding in a court to which the defendant ultimately

[50] Minnesota, for example, permits filing by facsimile transmission. Minn. R. Civ. P. 5.05. The Minnesota federal district courts do not permit this. D.Minn. LR 5.1.

decided to object.[51] Had the University chosen to actively seek dismissal of the supplemental claim at the very outset of the federal proceeding, the matter would have been in the Minnesota district court (assuming that Petitioners chose to refile it there) within a matter of weeks.

If Minnesota state agencies objected invariably and at once to the assertion of supplemental claims, section 1367(d) would have little practical impact; knowledgeable attorneys would not ordinarily bother to include such claims in federal complaints. Section 1367(d) comes into play here precisely because that is not the invariable practice of state defendants. Application of section 1367(d) would affect the outcome of this particular litigation only because it prevents the University from both retaining the option of acquiescing in supplemental jurisdiction and nonetheless objecting that that very option had delayed the date when the state law claim ended up in state court. The state of Minnesota has not determined that preventing at all costs successful actions against state agencies is the only or most important state policy; if it were, the legislature would never have permitted actions against such agencies under the Minnesota Human Rights Act. Rather, the state has concluded that it has an important interest in a determination by the state courts of whether state agencies are in compliance with the MHRA.

[51] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 2, p. 114 (1964)("the principal purpose of the statute of limitations, that of giving notice to the opposing party that he must litigate a claim and should therefore preserve all relevant evidence, is served by the filing of a suit even in the wrong court.")

D. Congress May Regulate The Procedures Under Which Constitutional Rights, Including Those of the States, Are Asserted

Sovereign immunity is a defense of constitutional magnitude, but like any other constitutional right it must be asserted and litigated in a manner consistent with the procedural laws and rules applicable in the court in question. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). A criminal defendant asserting federal constitutional rights in the Minnesota courts must do so in accordance with state procedure. Minnesota must generally do the same when asserting its own constitutional rights in federal court.[52]

The University does not contend that as a general matter it should have been exempt from federal procedural requirements in asserting its sovereign immunity defense. In the federal proceeding the University filed and served its motion to dismiss in the manner prescribed by the Federal Rules of Civil Procedure and the local rules of the District Court for the District of Minnesota. In this Court the University does not assert any exemption from the requirements of the Supreme Court Rules.

Of course litigants asserting federal constitutional rights cannot be compelled to comply with state procedural rules so onerous that they unreasonably burden the exercise of those rights. *James v. Kentucky*, 466 U.S. 341 (1984). But no such unreasonable burden is present in the instant case. The

[52] In *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), the Court held that a state could in at least some circumstances raise an Eleventh Amendment defense for the first time on appeal. But this was no more than a court-made exception to a court-made rule; no act of Congress had required Illinois to raise at trial the defense in that case.

University has not, as the court below insisted, been penalized because Petitioners sought to assert their state law claim in federal court. (Pet. App. A11). To the contrary, the University's legal posture is the same as it would have been had it been sued from the outset in state court; the University received notice at the same time, the merits of the litigation will be resolved under the same legal standard, and Petitioners, if successful, will obtain the same remedies. To be sure, the matter reached state court several months later than would have occurred if Petitioners had anticipated the assertion of a sovereign immunity defense, but that was a necessary consequence of affording the defendant the option of staying in federal court, and most of the delay was a result of the nine months that passed between the filing of the original complaint and the University's motion to dismiss the supplemental claims on the basis of sovereign immunity.

The practical and legal problem which gave rise to the federal statute at issue in this case is inherent in the very existence of our federal system. One of the most fundamental decisions made by the framers of the Constitution was to authorize Congress to create a system of lower federal courts. U.S.Const., Art. III sec. 1. Article III envisaged a system of federal courts operating alongside the existing state courts; Congress immediately invoked this power when it adopted the First Judiciary Act creating circuit courts whose jurisdiction was in several respects expressly concurrent with that of the state courts. 1 Stat. 76-79.

The framers understood that the Constitution would lead to a set of parallel judicial systems, and understood that that would inevitably raise practical and legal issues. Much of the discussion at the time concerned a recognition that the two court systems would in some instances have concurrent

jurisdiction, and that there would be some types of claims which might be filed in either federal or state court. The Federalist, No. 82. The framers, of course, could not have foreseen all the issues that would ultimately arise because of the existence of such a dual judicial system. But those who drafted and ratified the Constitution were undoubtedly well familiar with experience in England, the colonies and the states with dual systems of courts of law and courts of equity, and they knew that the interrelationship between those courts had raised a wide range of issues requiring practical solutions.

The existence of the parallel federal and state court systems, like the co-existence of courts of law and equity, necessarily entails interrelationships and differences in practice and procedure which must ultimately be resolved by one sovereign or the other. Either the federal government or the states must have the authority to coordinate relationships between the two court systems.

The federal government has from the outset assumed the responsibility for coordinating the relationship between the federal and state court systems. In doing so, of course, Congress has been properly solicitous of both state law and the state courts. Section 34 of the First Judiciary Act directed federal courts to utilize state law as the rules of decision. *Compare* 1 Stat. 92 *with* 28 U.S.C. § 1652. In 1790 Congress required that federal courts accord full faith and credit to the determinations of state courts. *Compare* 1 Stat. 122 *with* 28 U.S.C. § 1738. In 1793 Congress adopted what has come to be called the anti-injunction act, forbidding the federal courts save in certain narrow circumstances to issue injunctions to stay state court proceedings. *Compare* 1 Stat. 335, ch. 22, § 5 *with* 28 U.S.C. § 2283. The federal habeas corpus statutes, out of respect for the state judicial systems, require both exhaustion

and a degree of deference to state court determinations. 28 U.S.C. §§ 2241-55. But while federal legislation has long reflected solicitude for proceedings in and determinations by state courts, it has never been doubted that the coordination of relations between the federal and state court systems was the responsibility of the national government.

The very existence of supplemental jurisdiction, and the certainty that state claims will at times be dismissed without resolution by the federal courts, require the existence of *some* rule regarding whether such claims can be refiled in state court despite the running of the statute of limitations. This is not an area in which the federal and state courts can simply proceed independently of one another; there has to be a rule regarding tolling, and whatever it is will necessarily affect both court systems. Either the national government or the states must have the authority to adopt the controlling rule governing this issue; there is no third alternative.

The decision of the Minnesota Supreme Court arrogates to that state the supreme authority to control the ground rules governing these interrelated claims and proceedings, and thus to determine how litigants and federal judges must proceed in *federal* court. Minnesota law cuts off a plaintiff's right to refile in state court a dismissed supplemental claim upon the expiration of the applicable state limitation period, regardless of whether a motion to dismiss that claim has even been filed in federal court, regardless of how little time it would leave the federal judge to rule on a motion to dismiss, and regardless of whether it would expire before any federal appeal could be taken. If an appeal regarding a supplemental claim reached this Court on the eve of the expiration of the limitations period, the Minnesota decision would set an absolute deadline

for a decision by this Court, after which a decision declining to exercise federal jurisdiction would be fatal to that state claim.

In the instant case, state law requires the filing of an action under the Minnesota Human Rights Act within 45 days after the issuance of a state right-to-sue letter; even if a plaintiff filed a federal action on the very first day, it would be virtually impossible for a federal judge to hear and resolve in the short period that remained any disputes about supplemental claims. Nothing in this Court's Eleventh Amendment jurisprudence has suggested that either the terms of the Amendment or the principles of federalism accord to the states the right to interfere in this manner with the internal operations of the federal Article III courts.

The interrelationship of Minnesota limitations law and Minnesota claim preclusion principles pose a serious constitutional problem. Claim preclusion requires a plaintiff to attempt to raise state law claims in federal court, and to urge that federal court to exercise jurisdiction over those claims. A federal plaintiff who fails to do so will ordinarily be barred from state court. But, absent section 1367(d), a plaintiff who complies with this state requirement will in turn often be prevented by the state limitations period from refiling in state court if the federal court declines to exercise supplemental jurisdiction. Where that state claim arises under the Minnesota Human Rights Act, with its 45 day limitations period, a plaintiff who attempts without success to include that state claim in his or her complaint will always be unable to refile in state court. The net effect of that legal regime is to deny such a plaintiff any hearing on that state law claim, in violation of the due process guarantee of the Fourteenth Amendment. At the least Minnesota wields a threat of forfeiture of related state claims against any plaintiff who

attempts to litigate his or her federal claims in federal courts, interfering in a constitutionally impermissible manner with access to the federal courts.

CONCLUSION

For the above reasons the decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

STATE COURT DECISIONS HOLDING CLAIM PRECLUSION APPLIES TO STATE LAW CLAIMS THAT COULD HAVE BEEN ASSERTED IN FEDERAL ACTION

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Texas

Johnson v. Chaney, 1996 WL 671248 (Tex.App.-Hous.)
Fernandez v. Memorial Healthcare System, Inc., 896 S.W. 2d 227 (Tex. App. 1995)
Turner v. Richardson Ind. Sch. Dist., 885 S.W. 2d 553 (Tex.App. 1994)
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Penrod v. Nu Creation Creme, Inc., 669 P. 2d 873 (Utah 1983)
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Reynolds v. Fairfax County School Bd., 1992 WL 884596 (Va. Cir. Ct.)

West Virginia

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Wisconsin

Juneau Square Corp. v. First Wisconsin National Bank of Milwaukee, 122 Wis. 2d 673, 364 N.W. 2d 164 (1985)

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No.:
EM 97-013037

Lance Raygor and James Goodchild

Plaintiffs,

v.
University of Minnesota, a Minnesota State University,

Defendant.

ORDER AND MEMORANDUM

The above-captioned matter came before the Court for a hearing on March 2, 199, on Defendants' Motion to Dismiss. Howard L. Bolter, Esq., appeared on behalf of Plaintiffs. Andrew D. Parker, Esq., appeared on behalf of Defendants.

Based upon all the files, records and proceedings herein and upon the arguments of counsel, **IT IS ORDERED THAT:**

1. Defendants' Motion to Dismiss is **GRANTED**.
2. The accompanying memorandum is incorporated herein by reference

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 5/28/99

/s/
Cara Lee Neville
Judge of District Court

MEMORANDUM

I. Facts

The facts relevant to this motion are not disputed. Plaintiffs in this age discrimination case are two former employees of the University of Minnesota. Following their alleged unlawful termination, Plaintiffs on August 23, 1995 filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). On July 17, 1996, the MDHR dismissed the charges of both Plaintiffs. Dismissal letters indicated that civil action may be brought in court within 45 days. Plaintiffs evidently received the letters on July 18, 1996. On or about August 30, 1996, Plaintiffs commenced separate actions against Defendants in the United States District Court, alleging violations of the federal Age Discrimination in Employment Act (ADEA) and the Minnesota Human Rights Act (MHRA). The two actions were subsequently consolidated. Thereafter, Defendants moved to dismiss based upon the Eleventh Amendment (sovereign immunity)[1], and on July 11, 1997 the motion was granted. In its order, the federal district court dismissed Plaintiffs' state law claims without prejudice.[2] Within 45 days of dismissal of their federal court action, Plaintiffs commenced the instant action, which contains a single count alleging violations of the MHRA. The instant action has been stayed pending the outcome of the federal court appeal, but the stay has been lifted for the limited purpose of hearing Defendants' present motion to dismiss.

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[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] Plaintiffs have appealed the decision to the 8th Circuit Court of Appeals. As of the date of this order, the appeal has not been decided.

II. Limitations Periods

This motion to dismiss presents a pure question of law concerning application of statutory and equitable tolling provisions to a statute of limitations. The MHRA requires that a person claiming unlawful employment discrimination first file a complaint with the MDHR as a precondition to suit. There is no dispute as to whether Plaintiffs did so within the required 180 days. The statute contains a second limitations period, allowing a claimant 45 days following receipt of a letter from the MDHR rejecting their claim (commonly known as a "right to sue" letter) in which to commence a civil court action. Failure to do so will render any subsequent suit untimely, resulting in dismissal upon motion by a defendant.

In the instant case, the Plaintiffs timely commenced their claims in federal court under the MHRA, invoking federal supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Their state court claims, however, were filed well outside the 45-day limitations period. The question then is whether the federal court action tolled application of the 45-day limitations period. (The state court action was filed less than 45 days after the federal court action was dismissed). In opposing the instant motion to dismiss, Plaintiffs raise two possible grounds for tolling, statutory and equitable. These will be addressed in turn.

III. Statutory Tolling

Plaintiffs bringing an action in federal district court premised on federal question jurisdiction may now assert connected state court claims under the federal court's supplemental jurisdiction. 28 U.S.C. § 1367(a) (1993). Under that section, supplemental jurisdiction applies "in any civil action of which the [federal] district courts have original jurisdiction". Id. Subsection (d) of the same statute contains

a provision tolling potential state court claims during their pendency in federal court, and for thirty days after their dismissal. 28 U.S.C. § 1367.[3] Defendants in moving to dismiss assert that the tolling provision does not apply, because Plaintiffs' ADEA claim does not qualify as one in which the federal court had "original jurisdiction".

The question presented on this motion appears to be one of first impression, namely whether dismissal of a federal law claim on Eleventh Amendment grounds means that the dismissing court never had "original" jurisdiction under 28 U.S.C. § 1367(a) for purposes of that statute's tolling provision. Plaintiffs in reliance on Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) assert that because the federal court in this case dismissed Plaintiffs' state law claims without prejudice, the tolling statute must apply. Franklin, however, is clearly distinguishable. Unlike the instant case, the plaintiff in Franklin brought a federal civil rights action and pendant state law claims against both the state and a state employee, the latter in his private as well as official capacity. The court's holding that the statutory tolling provision applied only applied to the non-state defendant. All claims against state defendants had been dismissed on immunity grounds, and were not the subject of this ruling. Moreover, the claim to which tolling applied had been dismissed for failure to state a claim rather than on grounds of immunity, as in the instant case.

Neither side has cited to any relevant legislative history, and no cases have been found on point. In cases involving dismissal of actions against state employees on the basis of qualified immunity, federal courts declining to exercise supplemental jurisdiction over remaining state law claims have commented that such claims are tolled pursuant to 28

[3] Tolling applies if "any claim asserted under subsection (a)" is dismissed. In the instant case, the Federal district court dismissed the pendant state law claims without prejudice.

U.S.C. § 1367(d). See, e.g., Sapp v. Cunningham, 347 F.Supp. 893 (D. Wyo. 1994) (dismissing § 1983 claims on basis of qualified immunity). However, in none of the cases reviewed did the court discuss whether original jurisdiction existed in the first instance.[4]

For the reasons stated more fully below, the Court concludes that the tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction". The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed Plaintiffs' state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

A Louisiana court recently addressed this issue for purposes of application of a state tolling statute. In Allo v. Horne, 636 So.2d 1048 (La. App. 1994), plaintiff bus driver brought a federal court action against a school board and various individuals, alleging breach of a various federal civil rights laws and pendant state law claims. The federal district court subsequently dismissed the federal law claims for failure to state a claim. The court then declined to accept jurisdiction over the remaining pendant state law claims, which it dismissed without prejudice for lack of subject matter jurisdiction. In a later-filed, co-extensive state court

[4] The failure of the courts to address this question perhaps owes to fundamental difference between Eleventh Amendment immunity, which applies to states, and qualified immunity, which applies derivatively to private individuals employed by states, acting under the color of state law. In the latter case the court properly exercises original jurisdiction because the individual has been sued qua individual. A second possibility is that the individual defendants simply have never raised this argument before.

action, defendants moved to dismiss based on statute of limitations (known as "prescription" in Louisiana). For purposes of applying the state's tolling law. the issue for determination was whether the federal court was a "court of competent jurisdiction" in the prior action. The defendants argued that tolling did not apply because the state claims, which plaintiff asserted in his state court action, had been dismissed by the federal court for lack of subject matter jurisdiction. The court disagreed, noting that one must look at the entire complaint to determine whether the federal court has jurisdiction in the first instance. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). Central to its ruling that the federal action tolled application of the limitations period, the court observed that the federal claims had been dismissed on the merits rather than for want of subject matter jurisdiction. Accordingly, the federal court was one of competent jurisdiction.[5]

The instant case is distinguishable from Allo because here both the state and federal claims were dismissed for lack of subject matter jurisdiction.[6] Based on the logic of Allo, the complaint to the district court herein was not a civil action of which the court had "original jurisdiction", and the tolling provision of 28 U.S.C. § 1367 does not apply.

[5] Nowhere in the decision did the court discuss the federal tolling statute under consideration in the instant case. The decision also contains no discussion of 11th Amendment immunity, which evidently was not raised as a defense in the federal court action.

[6] The court's opinion reads in full as follows:

> Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that: Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

Although this opinion does not describe the nature of the immunity defense, the basis for dismissal of all claims, federal and state, is Rule 12(b)(1), dismissal for lack of subject matter jurisdiction.

IV. Equitable Tolling

Equity permits a court to relieve a party from the preclusive effect of a statute of limitations in the furtherance of justice. As explained by the court in Bartlett v. Miller and Schroeder Municipals, Inc., 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (citation omitted), "Tolling principles are a creature of equity and the right to a tolling of the statute of limitations accrues only when the interests of justice require it." Prejudice to defendants is a valid consideration for purposes of this doctrine. Ochs v. Streater, Inc., 568 N.W.2d 858 (Minn. Ct. App. 1997). However, it has been held that equitable tolling is reserved for circumstances that are "truly beyond the control of the plaintiff." Shempert v. Harwick Chemical Corp., 151 F.3d 793, 797 (8th Cir. 1998) (holding that Title VII action not tolled where plaintiff failed to sign and return the Charge to the EEOC before the November 11th expiration of the filing period, despite the fact that she only received it in the mail on November 9th); Ochs, supra (employee was not entitled to equitable tolling of 45-day limitations period in which to bring age discrimination action, where employee offered no evidence that circumstances beyond his control prohibited him from serving complaint within statutory period).

In order for the doctrine to apply, a plaintiff must make a showing of excusable neglect, which may or may not be attributable to defendant. Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir.1998) (holding that actions taken by EEOC worker excused employee's late filing of Title VII charge). But see Arigo v. U.S., 980 F.2d 1159, 1162 (8th Cir. 1992) (citing Irwin v. Veterans Admin., 498 U.S. 89, ----, 111 S.Ct. 453, 458 (1990)) (equitable tolling does not extend to "garden variety cases involving excusable neglect"). However, "innocent inadvertence" will not toll the statute

of limitations. Jones v. Consolidated Freightways Corp., 364 N.W.2d 426, 429 (Minn. Ct.App. 1985).

Underscoring the narrow focus of this doctrine, equitable tolling will not restore an untimely claim where, through no fault of a party, her attorney miscalculates a statute of limitations. Nolting v. Yellow Freight System, Inc., 799 F.2d 1192, 1200 (8th Cir. 1986). More relevant to the facts at bar, filing in the wrong court will not rescue an untimely-commenced action in the proper court under this doctrine. Lambrecht v. Ford Motor Co., 729 F.2d 1162 (8th Cir. 1984) (concluding under Minnesota law that doctrine of equitable tolling, sought to be invoked on ground of plaintiff's having erroneously originally filed suit in Michigan, would not be applied to permit otherwise untimely diversity action to proceed against automobile manufacturer); Neitz v. Scharf Auto Supply, Inc., 1988 WL 36762 (Minn. Ct.App. 1988) (holding that filing a grievance with the wrong agency – a local rather than state human rights commission – was insufficient grounds for tolling the MHRA).

Here it is not argued that Defendants did or said anything to prevent Plaintiffs from commencing a state district court action within the 45-day limitations period. Rather, Plaintiffs argue that they elected to pursue their MHRA claims in federal court in the good faith belief that the action could be maintained there. Lack of clarity on a question of jurisdiction is sufficient grounds for invoking equitable tolling, particularly where there has been no demonstration of prejudice to the defendant. Capital Tracing, Inc. v. U.S., 63 F.3d 859 (9th Cir. 1995). In this regard, Plaintiffs point out that at the time they commenced their federal court action, four other circuits had barred the exact same immunity defense raised by the Defendants. There was

no binding authority in the Eighth Circuit, which had not yet passed on this question.[7]

The fatal flaw in Plaintiffs' argument is that there was no lack of clarity as to whether they could pursue supplemental state law claims. This is to say that even had the court concluded that it could hear Plaintiffs' federal law (ADEA) claim against Defendants, the court would have had to dismiss their state law (MHRA) claims for lack of jurisdiction, supplemental or otherwise. See Lembach v. State of Indiana, 987 F.Supp. 1095 (N.D. Ind. 1997.) (11th Amendment bars damages claims against state, and court cannot assert supplemental jurisdiction over claims otherwise barred by the 11th Amendment); Doran By and Through Doran v. Condon, 983 F.Supp. 886, 891 (D. Neb. 1997) (dismissing state from suit entirely "[b]ecause Plaintiffs' only claims against the defendant State of Nebraska are state-law tort claims"). Indeed, in none of the seven cases from other circuits cited by Plaintiffs for the proposition that a state defendant may be subject to suit in federal court under ADEA did the plaintiff even assert supplemental or pendant state-law claims against the state defendants. At the time Plaintiffs brought their federal court action, it was (and remains) settled law that the federal courts lacked matter jurisdiction to hear these supplemental claims, irrespective of whether the ADEA action could be maintained. See Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900, 907, 465 U.S. 39 (1984) (states are immune from suit in federal court for violations of state law).

Defendants cites Ochs, supra, for the proposition that an attorney's erroneous interpretation of a statute of limitations

[7] Complicating matters is the fact that the court in which the action was brought previously ruled that federal courts do not have jurisdiction over federal discrimination claims asserted against states. Humenansky v. Regents of Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997). However, the 8th Circuit's decision affirming that ruling appears to have been rendered after Plaintiffs commenced their federal court action.

will not warrant equitable tolling. Although Ochs is distinguishable,[8] another case cited by Defendants, Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976) is dispositive. In Bonhiver, the Court concluded that "the commencement of an action in a federal district court which lacks jurisdiction does not toll the statute of limitations". The parties in that case arguing for estoppel originally were putative class members in a federal class action suit. Said plaintiffs, however, failed to meet the $10,000 jurisdictional minimum, depriving the federal court of jurisdiction to hear their claims. Accordingly, there could be no tolling of the statute of limitations to allow their intervention in a subsequent state court action, which was filed after the statute of limitations had run on the claims.

Plaintiffs attempt to distinguish Bonhiver, asserting that the federal district court initially had federal question jurisdiction over their ADEA claim and supplemental jurisdiction over their MHRA claim, and that federal jurisdiction was dislodged only after Defendants prevailed on their immunity defense. Plaintiffs in so arguing creates a distinction without a difference. As applied to the facts of this case, sovereign immunity is identical to the absence of subject matter jurisdiction, functionally and as a matter of definition.

That a party might raise sovereign immunity based on the Eleventh Amendment as an "affirmative defense" does not presuppose that the court had jurisdiction over the matter in

[8] The court's rejection of plaintiff's limitations argument in Ochs was not part of its analysis of equitable tolling at all. Rather, the ambiguity argument was part of a question of statutory construction. In that case, counsel attempted to create ambiguity in the law where none existed in order to avoid dismissal based upon the statute of limitations. In the court's word, counsel "contrive[d] a series of arguments to revive his claim." Id. at 859. Specifically, counsel argued that the words "bring an action" must mean something other than "commence an action", because a separate statute calls for the chapter's provisions to be liberally construed. The court disagreed, holding that to "bring" unambiguously meant to "commence".

the first place.[9] Sovereign immunity is an inherent recognition that a court lacks jurisdiction. As noted by the Justice Powell, "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst, 104 S.Ct. at 907. He went on to describe the Eleventh Amendment as an "explicit limitation on federal jurisdiction". Id. at 917. See also Moore v. State of Indiana, 999 F.2d 1125, 1129 (7th Cir.1993) (11th Amendment operates to divest the court of subject matter jurisdiction). The historic basis for this view has been described as follows: "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution." Spanel v. Mounds View School District No. 621, 118 N.W.2d 795, 800, 264 Minn. 279 (1962) (quoting Justice Traynor) (emphasis supplied).

An exception arises in rare cases involving the application of a sovereign immunity defense to a situation involving concurrent jurisdiction, also known as dual sovereignty. In Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996), a non-Indian employee of a tribe-owed business brought a civil action in state district court on state law claims arising from her employment. The court explained the immunity issue as follows:

> At the heart of this case is the issue of whether tribal business entities are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts--jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit.[10]

Gavle, 555 N.W.2d at 288. In Gavle, the court specifically ruled that it had jurisdiction to hear such claims, even though they arose in part within the jurisdictional boundaries of a sovereign nation. Nonetheless, the court went on to hold that the tribal corporation was entitled to sovereign immunity and, accordingly, dismissal of plaintiff's action. Concurrent jurisdiction in that case was premised on the special constitutional status of Native Americans and other historical considerations, which on the facts of Gavle permitted the state to share in jurisdiction over the case. These factors are absent in the present case, insofar as federal courts lack jurisdiction to hear actions against states altogether. See Pennhurst, 104 S.Ct. at 918 ("[the Eleventh] Amendment thus is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts"). Without more, lack of prejudice to a defendant is insufficient grounds to invoke equitable tolling. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 1726 (1984) (absence of prejudice is "not an independent basis for invoking the doctrine" of equitable tolling). Plaintiffs have not met the requirements for equitable tolling, and therefore, Defendants' motion to dismiss must be granted.

[9] In point of fact, Defendant to the instant case prevailed in the federal district court action on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

[10] The Minnesota Supreme Court's classification of immunity as an "affirmative defense" rather than a jurisdictional bar makes sense only in the content of concurrent jurisdiction. See discussion above. In this light, it is significant to note that the Court chose its words carefully, describing tribal sovereign immunity as an affirmative defense.

V. Conclusion

For the reasons set forth in this memorandum, Defendants' Motion to Dismiss is granted. Neither statutory tolling nor equitable tolling applies, and therefore Plaintiffs' suit is untimely.

C.L.N.